NO. SC 86083

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

JEREMY DEAN PIKE,

APPELLANT.

Appeal from the Circuit Court of Platte County, Missouri

Sixth Judicial Circuit

Honorable Abe Shafer, Judge

APPELLANT'S REPLY BRIEF

BRUCE B. BROWN, MO. BAR NO. 30307
P.O. BOX 679
KEARNEY, MISSOURI 64060
1-816-628-6100
1-816-628-4980 (FAX)

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

A. United States Supreme Court Cases ***Page***

B. Missouri Supreme Court Cases

C. Missouri Appellate Court Cases

D. Missouri Statutes

E. Missouri Rules of Court

F. Federal Cases

NO. SC 86083

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

JEREMY DEAN PIKE,

APPELLANT.

Appeal from the Circuit Court of Platte County, Missouri

Sixth Judicial Circuit

Honorable Abe Shafer, Judge

APPELLANT'S REPLY BRIEF

STATEMENT

Because the Respondent has raised additional issues not addressed by the Appellant in his brief, the Appellant submits this reply brief pursuant to Missouri Rules of Court 84.04(g). References to Respondent's brief will be abbreviated as "R.Br." and Appellant's opening brief as "App.Br.".

POINTS RELIED ON

POINT ONE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense wherein the judge was a lawyer as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional, violating the Equal Protection clauses of both the Missouri Constitution (Article One, §2) and United States Constitution (Amendment 14), in that it denies equal protection to those who plead guilty or have been found guilty of municipal intoxication-related traffic offenses by treating differently those persons who appear before a municipal judge who is a lawyer versus those persons who appear before a municipal judge who is a nonlawyer for purposes of criminal penalties and in that a plea before a lawyer judge can be used for enhancement, but a plea before a nonlawyer judge cannot be used for enhancement.

Nichols v. United States, 511 U.S. 738(1994).

North v. Russell, 427 U.S. 328(1973).

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional, violating the Due Process clauses of both the Missouri Constitution (Article One, §10) and United States Constitution (Amendment 14), in that it involves an unconstitutional deprivation of due process, treating prior violations of municipal intoxication-related traffic offenses, which are civil prosecutions, as equivalent to state intoxication-related traffic offenses, which are criminal, for the purpose of enhancing the criminal penalty from a misdemeanor to a felony and in that the dual systems of prosecution when used in this manner violate notions of fundamental unfairness.

Nichols v. United States, 511 U.S. 738(1994).

North v. Russell, 427 U.S. 328(1973).

Argersinger v. Hamlin, 407 U.S. 25(1972).

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to suppress the evidence obtained as a result of the traffic stop of Defendant because the stop violated Defendant's Fourth Amendment rights in that prior to the stop, the officer did not have probable cause to believe that any traffic violations had occurred, nor did he have a reasonable, articulable suspicion that the occupants of the motor vehicle were involved in any criminal activity.

State v. Beishline, 926 S.W.2d 501(Mo.App. W.D. 1996).

State v. Malaney, 871 S.W.2d 634(Mo.App. S.D. 1994).

State v. Mendoza, 755 S.W.3d 842(Mo.App. S.D. 2002).

POINT FOUR

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Driving While Intoxicated because a rational trier of fact could not have found Defendant guilty of all of the elements of Driving While Intoxicated beyond a reasonable doubt in that Trooper Comer's testimony was too contradictory, inconsistent, vague, and speculative to support a finding beyond a reasonable doubt that defendant was intoxicated at the time of the stop of the vehicle, in that the evidence of a blood alcohol content in excess of .08% was invalid or unreliable, and in that evidence of the results of the field sobriety tests cannot be relied upon as circumstantial evidence of intoxication.

State v. Kinkead, 983 S.W.2d 518(Mo. banc 1998).

State v. Sladek, 835 S.W.2d 308(Mo.banc 1992).

State v. Woods, 596 S.W.2d 394(Mo.banc 1980).

POINT FIVE

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Following Too Closely because a rational trier of fact could not have found Defendant guilty of all of the elements of Following Too Closely beyond a reasonable doubt in that Trooper Comer's testimony at most established a close proximity for a brief time period and failed to establish that the close proximity was not reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.

ARGUMENT

POINT ONE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense wherein the judge was a lawyer as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional, violating the Equal Protection clauses of both the Missouri Constitution (Article One, §2) and United States Constitution (Amendment 14), in that it denies equal protection to those who plead guilty or have been found guilty of municipal intoxication-related traffic offenses by treating differently those persons who appear before a municipal judge who is a lawyer versus those persons who appear before a municipal judge who is a nonlawyer for purposes of criminal penalties and in that a plea before a lawyer judge can be used for enhancement, but a plea before a nonlawyer judge cannot be used for enhancement.

Test

At pages 15 to 17 of its brief, the State addresses the issue about whether §577.023 "impinges upon a fundamental right, namely, the right to liberty", asserting that Appellant's reliance on the *A.B.* and *Baldasar* cases is misplaced and that the *Nichols* and *Almendarez-Torres* cases are controlling because *Nichols* overruled *Baldasar* and because *Almendarez-Torres* reaffirms "the traditional rule that a statutory provision specifying a greater penalty based on recidivism defines a sentencing factor rather than a separate crime

or element of a crime". Appellant respectfully submits that Respondent has misconstrued both Appellant's arguments and the holdings of the *Nichols* and *Almendarez-Torres* cases.

Initially, Appellant would point out that a fundamental liberty interest is impinged herein not only because "the statute `transform[s]` a misdemeanor into a felony" (R.Br. 16), but also because the statute "requires a mandatory term of imprisonment", enhancing the minimum punishment from "a fine for the first offense to one of imprisonment for subsequent offenses." (App.Br. 28, citing *A.B.*). With regard to Appellant's reliance on the *Baldasar* case, Appellant does not rely on "language in a concurring opinion . . ., stating that an uncounseled conviction cannot be later used to enhance punishment." (R.Br. 16). Instead, Appellant relied upon the concurring opinion as additional support for his argument that a significant deprivation of a liberty interest occurs as a result of using a prior conviction to transform the current offense from a misdemeanor to a felony "with all of the serious collateral consequences that a felony conviction entails", including the mandatory term of imprisonment.

As to the *Nichols* case, Respondent is correct about the *Nichols* Court overruling the *Baldasar* case, but is mistaken as to its conclusion that the *Nichols* case negates all precedential value of *Baldasar*. The *Nichols* Court's overruling was very specific, adhering to the holding in *Scott v. Illinois*, 440 U.S. 367(1979) that an uncounseled misdemeanor conviction was valid if imprisonment was not imposed as a part of the punishment, and then ruling "that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment". 511 U.S. at 746 & 747. The *Nichols* Court did not discuss that portion of the concurring

opinion upon which Appellant has relied. Simply put, the issue herein was not an issue in the *Nichols* case. However, the *Nichols* Court's reaffirmation of the holdings of the *Scott* and *Argersinger* cases supports Appellant's arguments because the *Nichols* Court recognized "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." 511 U.S. at 743; 114 S.Ct. at 1925 & 1926. As such reasoning applies herein, the "actual" imprisonment provision of §577.23.4 implicates fundamental rights of liberty, warranting the adoption of the strict scrutiny test when analyzing the constitutionality of the inequality of treatment herein.

With regard to *Almendarez-Torres*, it does not involve any issue about whether a mandatory imprisonment provision implicates fundamental rights of liberty. Instead, the issue was as follows:

> The question before us is whether this latter provision defines a separate crime or simply authorizes an enhanced penalty. If the former, i.e., if it constitutes a separate crime, then the Government must write an indictment that mentions the additional element, namely, a prior aggravated felony conviction. If the latter, i.e., if the provision simply authorizes an enhanced sentence when an offender also has an earlier conviction, then the indictment need not mention that fact, for the fact of an earlier conviction is not element of the present crime.
>
> 523 U.S. at 266.

As this issue might apply to the enhancement provisions of §577.023, there is a requirement under §577.023.5(1) that the State plead "all essential facts warranting a finding that the defendant is a prior offender or persistent offender". This issue does not exist herein.

Respondent also cites the ***Hefflin*** case, alleging that Missouri law follows the law recognized in ***Almendarez-Torres***. (R.Br. 17). The ***Hefflin*** case merely recognizes that the failure to prove a prior conviction, which was an element of that current offense, did not entitle the defendant to an acquittal of the current offense, but "would go only to the amount of punishment to be inflicted". 89 S.W.2d at 941. As such could apply herein, §577.023.5(2) requires the State to introduce evidence "that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt the defendant is a prior offender or persistent offender". Failing to do so would appear to not entitle a defendant to an acquittal of the basic offense of DWI under §577.010, but it would entitle the defendant to an "acquittal" of a class A misdemeanor or a class D felony, as the case may be, which would also involve the amount of punishment to be inflicted. If the Court rules that §577.023.1(1) is unconstitutional, there will be an "acquittal" of the felony, but not an acquittal of the offense of DWI, with resentencing on a class A misdemeanor.

Finally, for the purposes of determining whether a fundamental liberty interest is implicated, it is irrelevant as to whether an enhancement statute creates a "new offense" or as to whether the defendant is subject to sentencing on a "lesser offense". (R.Br. 17). The focus is upon the enhancement from a penalty of a fine for the first offense to one of mandatory imprisonment for subsequent offenses and from a misdemeanor to a felony with

all of the serious collateral consequences that a felony conviction entails. Respondent's reliance on the *Zoellner* case is also misplaced because, as the *Zoellner* Court clearly recognized, "[d]efendant does not contend that the alleged due process violation infringed upon a fundamental right; therefore, we review his claim under the rational basis test". 920 S.W.2d at 135.

For the narrow purposes herein, the mandatory imprisonment provisions of §577.023.4 and the felony provisions of §577.023.3 implicate fundamental rights of liberty. Thus, the strict scrutiny test applies. See, also, *North v. Russell*, 427 U.S. 328, 334(1976)("once it appears that confinement is an available penalty, the process commands scrutiny.").

"b. Distinction in Statute Rationally Related to Legitimate State Interest"

In this portion of its argument, Respondent initially asserts that Appellant has claimed "that the *only* legitimate State interest involved in this case is the State's interest in deterring or severely punishing repeat offenders". (R.Br. 18) (Emphasis ours). Appellant has not so limited his argument, further recognizing the "reliability purpose". (App.Br. 29). However, as with any recidivist statute, the primary purpose is deterring and severely punishing repeat offenders. And, as reflected in Appellant's "Example One" and "Example Two", "there simply is no rational basis for treating Defendant A and Defendant B differently." (App.Br. 34 & 35). It is as to the "deterrent/punishment purpose" that the *Baker* Court's opinion "compels a finding that this statute violates equal protection." (R.Br. 21; App.Br. 31-35). Respondent does not refute Appellant's argument, instead focusing on the "reliability purpose", asserting that the legislature "recognizes the important and

desirable interest of ensuring that the prior conviction was reviewed by a judge fully trained in the law". (R.Br. 20). Even so, such a purpose does not provide a sufficient basis for the inequality of treatment herein.

In support of its arguments, Respondent initially cites the *North* and *Shadwick* cases, basically holding that the use of nonlawyer judges is constitutional if there is a system providing trial de novo review before a lawyer judge. (R.Br. 18 & 19). As reflected in those cases, trial de novo review by a lawyer judge is constitutionally required to provide the defendant the *opportunity* to challenge the validity of the proceeding. See, *North*, 427 U.S. at 334-336. However, a defendant may not appeal for a variety of reasons, including financial ability or the fact that the punishment did not involve imprisonment. See, e.g., *City of Kansas City v. Johnney*, 760 S.W.2d 930, 932(Mo.App. W.D. 1988)(when judgment of municipal court becomes a nullity, it is then without any effect as to the penalty imposed upon conviction). Because the municipal proceeding may be unreliable – such as when the conviction is uncounseled and imprisonment is imposed, see, *Nichols*, 511 U.S. at 743-747 -- if the defendant fails to appeal, then there should be a rebuttable presumption that the conviction is reliable, which would accommodate the State's interest in obtaining a final judgment but which would accommodate a defendant's right to challenge an invalid proceeding when it is used to the defendant's prejudice in a subsequent proceeding, such as to enhance punishment for another offense.

In Missouri, like in the *North* case, a defendant in a nonlawyer judge proceeding has a right of trial de novo review before a lawyer judge. See, MO.REV.STAT. §479.200.1 (A-1). Thus, the "important and desirable interest in having lawyer judges make

determinations" is constitutionally satisfied. If the defendant does not pursue a trial de novo, there is a presumption of reliability as to a guilty plea or a conviction. However, under the nonlawyer/lawyer judge provisions of §577.023.1(1), there is a *conclusive* presumption of invalidity as to the nonlawyer judge proceeding but one of validity as to the lawyer judge proceeding. Viewed in the proper context, there is no legitimate basis for the unequal treatment set forth in §577.023.1(1).

Respondent next cites §479.200.1 & .2, which permits a trial de novo from a guilty plea before a nonlawyer judge but not from a lawyer judge, alleging that it evinces the legislature's belief "that decisions of non-lawyer judges in municipal prosecutions require greater protection". (R.Br. 19 & 20). Even so, it is still invalid for equal protection purposes in light of the role of the judge, the legal training, and the detailed guidelines under the rules. Perhaps this inequality of treatment also has its roots in an "exaggerated response" to the ***North*** case, recognizing the significance of having trial de novo review after a trial or a plea of guilty. 427 U.S. at 335 & 336. Given the proper case, an equal protection challenge to §479.200 might be sustained. However, neither this Court nor counsel should speculate in absence of the proper factual basis.

Finally, Appellant would expand upon the examples set forth in his opening brief to show the defects in Respondent's arguments:

> ***Example One:*** Defendant A first pleads guilty to a state BAC and within the ten year period thereafter pleads guilty to a municipal BAC wherein the judge was an attorney. In both instances, his blood alcohol content was .08%. In the municipal case, the judge failed to follow Rule

37.58[37.59]. He is still considered to be a persistent offender subject to a felony prosecution.

Example Two: Defendant B first pleads guilty to a state DWI and within the ten year period pleads guilty to seven (or more) municipal DWI's wherein the judge was not an attorney. In all instances, his blood alcohol content was .20% or above. In all of the municipal cases, the judge scrupulously followed Rule 37.58[37.59]. He is still only a prior offender subject to a Class A misdemeanor prosecution.

Respondent recognizes that "municipal convictions by non-lawyer judges are valid and may be considered constitutionally `reliable`", but then asserts that "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires" and that the "legislature was free to provide the greater protection available by having only the convictions entered by lawyer judges used to enhance punishments". (R.Br. 20 & 21). Appellant agrees that States can provide greater constitutional protections, but "greater protection" is still subject to "equal protection".

Again, "it is not the artificial status of being a lawyer judge versus a nonlawyer judge which makes the plea reliable, but instead whether the judge followed the rules". (App.Br. 31). If the legislature desires to provide greater protection, the "ready alternative" for satisfying the mandates of equal protection would be to require a showing that the "judge in such case" complied with the provisions of Rule 37.58 and that the "defendant was represented by or waived the right to an attorney in writing." (App.Br. 30). This Court must

declare the nonlawyer-lawyer judge provisions to be unconstitutional, thus voiding the use of a municipal conviction as a basis for enhancement, and allow the legislature to determine anew whether municipal violations can be used for enhancement purposes.

POINT TWO

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to dismiss the felony information because the enhancement of the charge of Driving While Intoxicated from a misdemeanor to a felony was based upon a plea of guilty to a prior municipal intoxication-related traffic offense as permitted under MO.REV.STAT. §577.023.1(1) and because this provision is unconstitutional, violating the Due Process clauses of both the Missouri Constitution (Article One, §10) and United States Constitution (Amendment 14), in that it involves an unconstitutional deprivation of due process, treating prior violations of municipal intoxication-related traffic offenses, which are civil prosecutions, as equivalent to state intoxication-related traffic offenses, which are criminal, for the purpose of enhancing the criminal penalty from a

misdemeanor to a felony and in that the dual systems of prosecution when used in this manner violate notions of fundamental unfairness.

Facts

At pages 23 & 24 of its brief, the State sets forth its version of the facts. While perhaps a technical point, the record of the municipal conviction was actually not admitted "without objection". As a part of the stipulation, Appellant renewed his previous motion to dismiss and supplemented the motion with additional suggestions, which included a certified copy of the alcohol-related ordinance. (Tr. 70; L.F. 11-23, 45-54; App.Br. at A-9 to A-13). Appellant thereafter preserved these issues in various motions. (L.F. 43, 55, 57, 59).

Test

As in Point One, a fundamental right of liberty is clearly involved because of the mandatory imprisonment provisions of §577.023.4 and the felony provisions of §577.023.3. The "strict scrutiny test" guides appellate review.

"b. Statute Rationally Related to Legitimate State Interest"

In this portion of its brief at page 27, Respondent initially contends that the *Zoellner* Court "considered and rejected a claim that the use of municipal convictions to enhance punishment for subsequent DWI convictions violated substantive due process". However, as the *Zoellner* Court clearly stated, "Defendant does not contend that the alleged due process violation infringed upon a fundamental right; therefore, we review his claim under

the rational basis test". Therefore, the Court should reject the *Zoellner* Court's analysis because a heightened level of scrutiny applies herein.

If the Court should consider the *Zoellner* Court's analysis as potentially instructive, Appellant submits that the *Zoellner* Court did not consider Appellant's arguments. Even though Appellant also acknowledges the State's compelling interest in deterring and punishing repeat offenders, due process still requires the existence of a fair system of prosecution. The dual system in Missouri simply does not satisfy this standard.

"c. Procedural Due Process"

In this portion of its brief at pages 28 to 30,, the State characterizes Appellant's claim as involving "procedural due process". Appellant's claim does not really involve "procedural due process", but instead "substantive due process". The municipal prosecution system does provide notice and opportunity to be heard. In light of the *North* case and Appellant's analysis in Point One, the basic system generally satisfies due process standards. However, "[o]n its face, treating municipal violations as equivalent to state violations may not appear to violate any notions of fundamental fairness, but a close examination of these two systems reveals striking and fundamental differences." (App.Br. 40).

Respondent attempts to refute Appellant's arguments, initially asserting that the "specific violations appellant points to are the differences in discovery, the right to a jury trial, and the right to appellate review". (R.Br. 28). Appellant's claims do not involve just

three "specific violations", but instead involve other real concerns about an entire system which simply is not equivalent to the state prosecution systems. In other words, Respondent is attempting to improperly ignore Appellant's whole argument, emphasizing minor parts and taking it out of context.

In light of the ***Baldasar*** case, municipal prosecutions/misdemeanor cases "may create an obsession for speedy dispositions, regardless of the fairness of the result." 446 U.S. at 228, fn 2; see also, ***Argersinger v. Hamlin***, 407 U.S. 25, 34-36 (1972), discussing this problem in detail; and ***North***, noting that a municipal prosecution system eases "burdens on the state judiciaries" and will "provide speedier and less costly adjudications" than those provided in courts "where the full range of constitutional guarantees is available . . .". 427 U.S. at 336. Moreover, under Missouri's dual system, concurrent *prosecutions* for the same offense can occur, and more significantly, a municipality could "threaten" to refer a prosecution to the State if a "speedy disposition" is resisted. In light of the enforcement system in villages, this circumstance cannot be ignored since imprisonment for any violation, particularly a DWI, is not available as a punishment, but in a State prosecution for a DWI, imprisonment is an option for a class B misdemeanor and is mandatory for a class A misdemeanor or a class D felony. (App.Br. 42-44).

Respondent counters by relying on the ***Nichols*** case, but the ***Nichols*** case does not involve the issues herein. Instead, the gist of the ***Nichols*** Court's holding involved the use of a valid conviction or past criminal behavior to enhance the *sentence* for a subsequent offense. 511 U.S. at 746-748. The charged offense in ***Nichols*** was a felony, not because of a prior offense, but because of the defendant's "current" conduct. The range of punishment

was not less than ten (10) years' imprisonment and not more than life imprisonment. Id. at 742, fn. 5. The trial court simply sentenced the defendant to a longer term of imprisonment based on the prior conviction, but still within the prescribed range of punishment, which is "consistent with the traditional understanding of the sentencing process, . . . often recognized as less exacting than the process of establishing guilt." Id. at 747.

However, in rejecting the alleged "splintered decision" in *Baldasar*, the *Nichols* Court did appear to rule that the prior conviction must be "constitutionally valid". 511 U.S. at 746 & 747. Herein, Appellant is challenging the constitutional validity of treating a municipal prosecution as equivalent to a state prosecution and of using a municipal violation for felony enhancement and mandatory imprisonment purposes. Because of the absence of "the full range of constitutional guarantees" and because of the potential undue pressures for speedier dispositions regardless of the fairness of the result, the dual system of prosecution in Missouri creates a fundamentally unfair system of prosecution. To correct this constitutional defect, "either the dual system must be eliminated, requiring all alcohol-related driving offenses to be prosecuted in the state criminal system, or a uniform system of prosecuting and imprisonment must be imposed upon all municipalities, which is constitutionally equivalent to the state criminal system". (App.Br. 44). Another option is simply not using any municipal violations for enhancement purposes in the state system.[1] This Court cannot impose the first two options, but this Court can and must impose the third option.

[1] To Appellant's knowledge, alcohol-related offenses are the only offenses so used.

POINT THREE

The trial court erred as a matter of law and to the prejudice of Defendant when it overruled all of Defendant's motions to suppress the evidence obtained as a result of the traffic stop of Defendant because the stop violated Defendant's Fourth Amendment rights in that prior to the stop, the officer did not have probable cause to believe that any traffic violations had occurred, nor did he have a reasonable, articulable suspicion that the occupants of the motor vehicle were involved in any criminal activity.

Facts

At pages 31 to 33 of its brief, the State sets forth its version of the facts. Appellant submits that his version provides a complete statement. In addition, some allegations of fact require additional comment.

One, Respondent alleges that as the vehicles "got closer" to Trooper Comer, "he could see that they were following each other `fairly closely` (Tr. 14)" and "he noticed no variation in the speed of the three vehicles on his radar unit, nor did he recall seeing any reduction in speed of the vehicles at all (Tr. 26, 127)". (R.Br. 32). Obviously, Trooper Comer did not consider the vehicles to be traveling "too closely". And, while he did not

recall any speed reductions at that time, he did acknowledge the possibility of a speed reduction of the first vehicle, reacting to the presence of his vehicle. (App.Br. 51 & 52). Thus, "fairly close" becomes temporarily "too close", which "will `naturally` occur as the following vehicle takes time to react to the reduction of speed of the lead vehicle" (App.Br. 60) and which may also result in reaction to the third vehicle. (App.Br. 61).

Two, Respondent asserts that "Comer observed nothing in the roadway or any other traffic which would have justified appellant's driving onto the shoulder (Tr. 15)". (R.Br. 33). However, Trooper Comer acknowledged that the left lane could have been closed with barrels or traffic cones or "some kind of barrier", separating the right and left lane. He just could not remember. (Tr. 23 & 24, 127; App.Br. 12 & 51). If he could not recall the presence of these objects, how could he notice anything in the roadway which might have caused Appellant to move over slightly to the right? In addition, without citation to the transcript, Respondent later contends that "as the officer did not observe either of the other two vehicles do the same", there would supposedly be some reasonable inference that nothing was "in the road that would have accounted for appellant's drifting from the roadway". (R.Br. 37). Actually, Trooper Comer did not testify about the movements of the first or third vehicle. His specific testimony was that he "could see a little bit of the right-tail light" of Appellant's vehicle when looking to the right of the third vehicle. (Tr. 28 & 29)

Respondent's allegations are not supported by the evidence.

"b. Preservation and Standard of Review"

At page 33 of its brief, Respondent asserts that because in "both his post-trial motion for judgment of acquittal and his point relied on, appellant only objected to the

denial of his `motions` to suppress, not to the subsequent admission of the evidence at trial", Appellant failed to "preserve the issue for review". With all due respect to Respondent, its contentions are absurd. And, if the *Shifkowski* and *Wolf* cases support Respondent's arguments, then the appellate courts are holding all appellants to an absurd standard.

In identifying the trial court's ruling, Appellant refers to "*all* of the motions to suppress". Appellant intended for the reference to "all" to include pretrial and trial motions. At trial, the following relevant events occurred:

> Q. What happened, after you stopped the middle car?
>
> MR. BROWN: Your Honor, at this point, I would interpose my objection, based upon the Motion to Suppress, and ask that you sustain that Motion to Suppress. And if not, ask that there be a continuing objection to all of the evidence that's gathered hereafter, or presented hereafter.
>
> THE COURT: The objection's overruled and it will be a continuing objection, Mr. Brown.
>
> MR. BROWN: Thank you, Your Honor.
>
> THE COURT: It will be considered a continuing objection.

(Tr. 95 & 96).

Upon review of the *Wolf* case, it is difficult to determine the appellant's alleged violation of the rules since the *Wolf* Court does not provide any particular critique. A possible violation may have occurred because that appellant only refers to "his *pretrial*

motion to suppress". 91 S.W.3d at 642. The *Wolf* Court also noted that "[t]o properly preserve the issue of the admissibility of the evidence sought to be suppressed, the evidence must be objected to at the time it is offered for admission at trial". Id.

As to the *Shifkowski* case, it is again difficult to determine the appellant's alleged violation in the absence of a critique. The *Shifkowski* Court states that in the point of error, the appellant "maintains the trial court erred by failing to sustain his motion to suppress statements . . .". 57 S.W.3d at 316. The *Shifkowski* Court then recognizes as follows:

> Initially, we note a trial court's ruling on a motion to suppress statements is interlocutory, *State v. Finster*, 963 S.W.2d 414, 417(Mo.App. 1998), and is subject to change during trial. *State v. Cardona-Rivera*, 975 S.W.2d 200, 203[3](Mo.App. 1998). Accordingly, a motion to suppress, in and of itself, preserves nothing for appeal, and ordinarily, a point relied on that refers only to a ruling on such motion is fatally defective. Id. at 203[2]; *Finster*, 963 S.W.2d at 417.
>
> Id. at 316[8].

The *Shifkowski* Court further recognized that appellant's point of error "challenges *only* the trial court's ruling on the motion to suppress." Id. (Emphasis ours).

Looking also at the *Cardona-Rivera* case, the appellant not only referred to the "pre-trial motion to suppress", but also waived the motion at trial by not objecting to the evidence. 975 S.W.2d at 203. Looking to the *Finster* case, it refers to the "pretrial" motion to suppress. 963 S.W.3d at 417[1]. The *Finster* Court basically denied the state's allegation

of the appellant's failure to preserve error, although it did note that issues involving only specific statements were preserved. Id. at 417[1, 2].

Appellant would submit that while these appellate courts are correct that a pretrial motion to suppress is an interlocutory motion and by itself preserves nothing for appeal, a mere failure to use such specific words as "overruled the motion to suppress and the objections at trial" should not result in a point of error not being preserved on appeal. The real issue is whether at trial the defendant made a sufficient objection. See, *State v. Beishline*, 926 S.W.2d 501, 508[10, 11](Mo.App. W.D. 1996); see also, *Taylor v. Baldwin*, 247 S.W.2d 741, 755 & 756[23](Mo.banc 1952)(Equity pierces form and takes cognizance of substance, and courts of equity will take no account of mere inaccuracies of expression or inappropriate choice of words).

Herein, Respondent does not allege that Appellant did not properly object at trial, alleging instead that "appellant's point *only* refers to the motion to suppress and not the actual admission of the evidence at trial". (R.Br. 33)(Emphasis ours). However, Appellant's point of error refers to "all" motions, and Appellant did properly object at trial. Respondent's contentions are frivolous.

Traffic Violation

With regard to this issue, Respondent asserts that "at the very least, Trooper Comer had an articulable suspicion" supporting the occurrence of a traffic offense. (R.Br. 35). Respondent cites several allegations of fact to support this conclusion. None of these "facts" support a finding of a *reasonable*, articulable suspicion.

Following Too Closely

Initially, Respondent contends that before the vehicles passed him, Trooper Comer "noticed that appellant was following `fairly closely,` and observed no slowing of the first car, either by sight or by radar, that would have shown that appellant's close proximity to the first car was not caused by any action by the driver of the first vehicle or that it had just occurred at the point when Comer saw the vehicles". (R.Br. 35 & 36). As addressed hereinbefore, the actual facts establish that Trooper Comer was having some memory lapses, but that he did acknowledge the possibility of a speed reduction of the first vehicle, reacting to the presence of his vehicle. (Tr. 26 & 27, 126 & 127). His conclusion about the vehicles following "fairly closely" is not really supported by the evidence since he could not "get a good distance" between the vehicles while observing the vehicles in his rearview mirror. (Tr. 26). And, "fairly closely" is not "too closely".

Respondent next relies upon the Missouri Driver Guide, stating "that anything less than a three-second gap between vehicles would constitute driving too closely". While this rule *may* be generally reasonable, by not reciting a three second rule or mandating a certain number of feet, cf., MO.REV.STAT. §304.044 (A-1), the legislature obviously intended a flexible standard, taking into account the ever-changing circumstances as to speed, traffic, and the condition of the roadway.

Respondent next asserts that because "it was dark outside", there would be a requirement of "more caution than during the day, as all of the drivers involved would have less of an opportunity to see and react to any obstructions in the road". (R.Br. 36). Appellant does not disagree with this basic conclusion, but would point out that where there is a reduction in speed with little or no warning, the likelihood of a temporary reduction in

distance also increases significantly. And, while the presence of the third vehicle *may* have required "appellant to be at a safe enough distance to gradually slow" (R.Br. 36), the evidence does not establish that the distance between the first and second vehicle was not "safe enough", nor does it establish that some gradual slowing did not occur. Appellant would also submit that while a driver is under a duty to anticipate the presence and movement of others on the highway, see, ***Schmidt***, 303 S.W.2d at 658[14], a driver cannot control the other driver's speed, reaction time, etc.. Simply put, sometimes temporary reductions in distance occur. The key to a violation under §304.017 is whether the close proximity continues for an unreasonable time or distance. Herein, it did not.

Respondent finally asserts that the testimony of an experienced highway patrol officer is admissible "to prove that a vehicle is following too closely". (R.Br. 36 & 37). While this is generally correct, the basis for the conclusion must be reasonably supported by facts viewed in light of the elements of the statute.[2] Appellant has presented the facts in his opening brief at pages 59 to 61 and will not repeat it herein. Suffice it to say that Respondent does not refute Appellant's arguments with facts and is instead attempting to overlook the facts by viewing the evidence out of context.

Lane Violation

In addressing this issue, Respondent appears to be focusing on two allegations of fact: one, the movement onto and up to a foot past the fog line on both occasions "was

[2] Appellant objected to Trooper Comer's conclusion at trial and in his post-trial motion. (Tr. 93; L.F 62 & 63).

unexplainable by any other traffic or potential obstruction on the highway"; and two, there was unusual operation because a reasonable officer would believe the driver was "drunk, asleep, or for some reason inattentive", citing further the *Malaney* case and the cases therein involving "virtual weaving". (R.Br. 37).

With regard to the first allegation, Appellant has addressed this matter hereinbefore. The only reasons for the movements being "unexplainable" are the trooper's memory lapses and the State's denial of reality. As to the second movement, not only could there have been the presence of cones, barrels or other barriers, but this event also occurred "just before the exit", a "normal" occurrence when exiting a roadway to the right. (App.Br. 65).

As to the second allegation, Respondent fails to explain the meaning of "virtual weaving" or how it occurred herein. In the *Mendoza* case, the Southern District noted that in "*Malaney*, we found that a traffic stop was justified because the defendant was weaving erratically within his lane of traffic". 75 S.W. 3d at 846. And, in looking over the cases cited in *Malaney*, Appellant notes the case of *Salter v. North Dakota Department of Transportation*, 505 N.W.2d 111, 115[3](N.D. 1993), recognizing that "slight" weaving within single lane is not so erratic as to create a reasonable, articulable suspicion of a traffic violation and does not serve as a valid basis for a vehicle stop. 871 S.W.2d at 637; see also, the *Colin* case. (App.Br. 56)("[I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy"). The evidence herein refutes the occurrence of any weaving. As noted in Appellant's opening brief, "Trooper Comer candidly admitted that over the distance

of the mile in which he observed the vehicles, Appellant's vehicle did not weave, did not make any sudden, unexplained, erratic movements to the right or left, and did not commit any turning violations when moving right onto the exit ramp". (App.Br. 65).

Viewed in the proper perspective, including the "totality of the circumstances", the State failed to establish probable cause to believe that any traffic violations occurred or to establish a reasonable, articulable suspicion of criminal activity. As to the alleged following too closely, the evidence establishes nothing more than a temporary reduction in distance between the vehicles as a result of the first vehicle's reduction of speed in reaction to the presence of the fully-marked, white patrol vehicle. As to the movements over the fog line, it was nothing more than gradual, brief, and slight, in a normal reaction to the presence of cones, barrels, or other barriers, marking the left lane closure.

"All" of the motions to suppress must be sustained.

POINT FOUR

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Driving While Intoxicated because a rational trier of fact could not have found Defendant guilty of all of the elements of Driving While Intoxicated beyond a reasonable doubt in that Trooper Comer's testimony was too contradictory, inconsistent, vague, and speculative to support a finding beyond a reasonable doubt that defendant was intoxicated at the time of the stop of the vehicle, in that the evidence of a blood alcohol content in

excess of .08% was invalid or unreliable, and in that evidence of the results of the field sobriety tests cannot be relied upon as circumstantial evidence of intoxication.

In looking over the arguments of Respondent in its brief (R.Br. 39-44) and of Appellant in his opening brief (App.Br. 67-92), there appears to basically be a difference of opinion as to the facts, a matter for this Court to decide. Respondent does cite the *Kinkead* case, alleging that the State is "entitled to rely on the trial court's admission of evidence, even it erroneous", that questions of admissibility and sufficiency are different, requiring a separate point of appeal, and that "[b]ecause he has not raised any such challenge, this Court should consider all of the evidence before the trial court to determine the sufficiency of the evidence". (R.Br. 40 & 41).

Upon examination of the *Kinkead* case, the rules cited therein initially appear to involve remands on sustaining a motion to suppress. However, the *Kinkead* Court cites the *Wood* case, which does apply to questions of evidentiary sufficiency at a trial. 983 S.W.2d at 519. Appellant would also refer the Court to *State v. Sladek*, 835 S.W.3d 308, 313(Mo.banc 1992) for those rules applying in a jury-waived case. Although Appellant still asserts that the evidence was insufficient when excluding the erroneous evidence, if there was a "submissible case", then Appellant submits that the erroneous evidence "influenced the fact finder to reach a finding of guilt", and a remand should occur for a new trial. Id.

POINT FIVE

The trial court erred as a matter of law and to the prejudice of Defendant when it denied all of Defendant's motions for judgment of acquittal with regard to the sufficiency of the evidence supporting the charge of Following Too Closely because a rational trier of fact could not have found Defendant guilty of all of the elements of Following Too Closely beyond a reasonable doubt in that Trooper Comer's testimony at most established a close proximity for a brief time period and failed to establish that the close proximity was not reasonably safe and prudent,

having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.

Respondent's arguments herein are basically no different than the arguments in Point Three. Again, viewed under the proper standards, the evidence established nothing more than a temporary reduction in distance between the vehicles as a result of the first vehicle's reduction of speed in reaction to the presence of the fully-marked, white patrol vehicle.

CONCLUSION

Appellant respectfully requests the Court to reverse the judgment of the trial court on Point One or Point Two, declaring §577.023 to be unconstitutional and remanding this case for sentencing. As to Point Three, Appellant respectfully requests this Court to reverse the trial court's denial of the motion to suppress, declare the evidence as being insufficient to support the convictions, and order Appellant to be discharged. As to point Four, Appellant respectfully requests the Court to reverse the conviction of Driving While Intoxicated, declaring the evidence as being insufficient, and order the discharge of Appellant, or in the alternative remand for a new trial. As to Point Five, Appellant

respectfully requests the Court reverse the conviction of "following too closely", declaring the evidence as being insufficient, and order the discharge of Appellant.

Respectfully submitted,

BROWN & BROWN ATTORNEYS, L.L.C.

*By:*_____

BRUCE B. BROWN, BAR NO. 30307
P.O. BOX 679
KEARNEY, MISSOURI 64060
1-816-628-6100
1-816-628-4980 (FAX)

ATTORNEY FOR APPELLANT

CERTIFICATE OF MAILING

I hereby certify that one copy of the Appellant's Reply Brief and one copy of the disk thereof were mailed this ____ day of March, 2005, to:

Mr. Richard A. Starnes
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

I further certify that the brief complies with Rule 84.06(b) by not exceeding 7,750 words and that it contains 7,678 words, that the disk has been scanned for viruses, and that the disk is virus-free to the best of my knowledge.

_____
BRUCE B. BROWN

NO. SC 86083

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

RESPONDENT,

vs.

JEREMY DEAN PIKE,

APPELLANT.

APPENDIX

Table of Contents